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# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-300

WILLIAM B. SAXBE, ATTORNEY GENERAL, ET AL.,
PETITIONERS

*v.*

ROBERT BUSTOS, ET AL.

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No. 73-480

CRISTOBAL CARDONA, ET AL., PETITIONERS

*v.*

WILLIAM B. SAXBE, ATTORNEY GENERAL, ET AL.

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*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE FEDERAL PARTIES[1]

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### OPINIONS BELOW

The opinion of the court of appeals (Govt. Pet.

[1] This Court granted cross-petitions for writs of certiorari. Because of the similarity of the underlying legal issues in the two cases, the parties agreed that the Solicitor General, in a single opening brief for the federal parties (petitioners in No. 73-300 and respondents in No. 73-480), would address the

App. 15–30)[2] is reported at 481 F. 2d 479. The district court issued no opinion.

## JURISDICTION

The judgment of the court of appeals (Govt. Pet. App. 31–32) was entered on April 16, 1973. The court of appeals denied plantiffs' petition for clarification and rehearing on May 22, 1973. On July 9, 1973, the Chief Justice extended the government's time for filing a petition for a writ of certiorari to and including August 14, 1973, and the petition was filed on that date. On August 22, 1973, the Chief Justice extended plaintiffs' time for filing a petition for a writ of certiorari to and including September 20, 1973. Plaintiffs' petition was filed on September 13, 1973. Both petitions were granted on January 14, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether aliens who have previously been accorded the privilege of residing permanently in the United States as immigrants, but who choose to commute on a daily or seasonal basis from their homes in Canada

issues in both cases, and that the opposing parties would file a single responsive brief also addressing the issues in both cases. For the sake of convenience, we shall refer to the federal parties as the "government" or the "Service," and to the opposing parties as the "plaintiffs."

[2] This Court has granted leave to dispense with the printing of a separate appendix in this case. References to the petitions for writs of certiorari and the appendices thereto will be in the form "Govt. Pet." or "Pl. Pet."



or Mexico to places of employment in the United States, may properly be readmitted on each entry as "immigrant[s], lawfully admitted for permanent residence, who [are] returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)).

## STATUTES AND REGULATION INVOLVED

The pertinent provisions of Sections 101(a), 211, and 212(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1101(a), 1181, and 1182(a), and of 8 C.F.R. 211.1, are set forth in the appendix to this brief, *infra*, pp. 79–83.

## STATEMENT

At issue in this case is whether alien "commuters" or "green-carders"—*i.e.*, aliens previously admitted for permanent residence in the United States who maintain homes in Mexico or Canada from which they commute on a daily or seasonal basis to work in this country—are properly classified by the Immigration and Naturalization Service as "special immigrants" (8 U.S.C. 1101(a)(27)(B)) who may be readmitted on each entry without regard to numerical limitations and without the documentation otherwise required under 8 U.S.C. 1181(a). The court of appeals held that daily commuters are properly so classified but that seasonal commuters are not.

### A. THE STATUTORY FRAMEWORK

The admission and exclusion of aliens[3] in the United States is governed by the Immigration and

[3] Alien "means any person not a citizen or national of the United States" (8 U.S.C. 1101(a)(3)).

Nationality Act of 1952, as amended, 8 U.S.C. 1101, *et seq.* An alien who is not excludable under 8 U.S.C. 1182 may be admitted as either an immigrant (generally one who seeks to enter the United States for permanent residence) or a nonimmigrant (one who seeks to enter on a temporary basis). The Act places numerical limitations on the issuance of immigrant visas (8 U.S.C. 1151–1153), the possession of which is ordinarily required for admission as an immigrant (8 U.S.C. 1181(a)). Most aliens seek admission as nonimmigrants, for which there are no numerical limitations. See *Gooch* v. *Clark,* 433 F. 2d 74, 78, n. 12 (C.A. 9), certiorari denied, 402 U.S. 995.

The Act, however, establishes a presumption that an alien is an immigrant: "Every alien shall be presumed to be an immigrant until he establishes * * * that he is entitled to a nonimmigrant status" (8 U.S.C. 1184(b)). And it defines "immigrant" as every alien who cannot bring himself within one of twelve enumerated classes of nonimmigrants (8 U.S.C. 1101 (a)(15)). One of the classes of nonimmigrants includes "an alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country" (8 U.S.C. 1101(a) (15)(H)).[4]

[4] The other classes of nonimmigrants include foreign government officials, temporary visitors for business or pleasure, aliens in transit to other countries, alien crewmen, treaty and international organization aliens, students, representatives of



An alien who does not qualify as a nonimmigrant—for example, one who seeks admission to perform temporary labor at a time when unemployed persons capable of peforming that labor *can* be found in this country—must be classified as an immigrant for purposes of admission to this country. That does not necessarily mean, however, that he would be subject to the Act's numerical limitations, for there are two classes of immigrants—"immediate relatives" of United States citizens and "special immigrants"—to whom the numerical limitations do not apply (8 U.S.C. 1151(a)).

"Special immigrant"—the only class relevant here—has five categories, including "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad" (8 U.S.C. 1101(a) (27)(B)). The term "lawfully admitted for permanent residence" is itself defined as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant * * *, such status not having changed" (8 U.S.C. 1101(a)(20)). An alien can achieve that "status" in the first instance only by complying with any applicable numerical limitations and with the Act's qualitative and documentary requirements for admission as an immigrant. Subsequent to his initial admission on that basis, however, he is free to depart the United States temporarily and to reenter without regard to numerical limitations.

foreign information media, exchange visitors, fiances and fiancees of citizens, and intracompany transferees (8 U.S.C. 1101 (a)(15)(A)–(L)).

Thus, an alien seeking to enter as an immigrant may do so without regard to numerical limitations if he has been previously "accorded the privilege of residing permanently in the United States as an immigrant," if his "status" as one possessing that privilege has not changed, and if he is "returning from a temporary visit abroad." The Act authorizes the Attorney General to readmit such an alien without requiring him to possess an immigrant visa, passport, or other formal documentation (8 U.S.C. 1181(b)).[5] The Attorney General has exercised his authority under that Section to dispense with all documentation, apart from an Alien Registration Receipt Card (Form I–151), for aliens who are returning from a temporary absence not exceeding one year (8 C.F.R. 211.1 (b)).[6]

A previously admitted returning alien is not excludable under the labor certification provisions of 8 U.S.C. 1182(a)(14). That Section makes excludable "[a]liens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified" that there are not sufficient workers in the United States to perform such labor and that employment of the aliens "will not adversely affect the

[5] The Section provides that "returning resident immigrants, defined in [8 U.S.C.] 1101(a)(27)(B) * * *, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation."

[6] The pertinent provisions of the regulation are set forth in the Appendix to this brief, *infra*, pp. 82–83.



wages and working conditions of the workers in the United States similarly employed." The exclusion is expressly applicable *only* to certain Western Hemisphere immigrants, to third and sixth preference immigrants, and to nonpreference immigrants.[7] It does not apply to "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)).

The government's contention in this case is that alien commuters are properly classified as "special immigrants" under 8 U.S.C. 1101(a)(27)(B)—and therefore may be readmitted without regard to numerical limitations, formal documentation, or labor certification—because in all cases they have been previously "accorded the *privilege* of residing permanently in the United States as an immigrant" (8 U.S.C. 1101(a)(20); emphasis added). The plaintiffs argue that the commuters are not "special immigrants," because they have not in fact exercised their "privilege of residing permanently in the United States" but rather maintain residences in Mexico or Canada.

[7] The Act establishes, with some exceptions, an annual worldwide numerical limitation on the admission of immigrants. The available immigrant visas are allocated first among those who fall within one of seven preference categories (8 U.S.C. 1153(a)(1)–(7)). Any portion of the worldwide quota that is not used by the seven preference groups is made available to other qualified immigrants in the chronological order in which they qualify (8 U.S.C. 1153(a)(8)). Aliens in this latter group are called "nonpreference immigrants."

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### B. THE PROCEEDINGS BELOW

1. On December 1, 1969, two California farm laborers (one an American citizen and the other a Mexican alien lawfully admitted to the United States for permanent residence) and the United Farm Workers Organizing Committee (a collective bargaining agent for farm workers) brought this suit in the United States District Court for the District of Columbia, naming as defendants the Attorney General, the Commissioner of the Immigration and Naturalization Service, and the Service's Regional Commissioner for the Southwest Region. The complaint sought a declaratory judgment and injunctive relief against the defendants' practice of readmitting alien commuters into the United States on a daily or seasonal basis as "special immigrants"—*i.e.* immigrants "lawfully admitted for permanent residence, who [are] returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)). Plaintiffs alleged that the commuters could not properly be classified as returning resident immigrants, that they should instead be classified as nonimmigrants under 8 U.S.C. 1101(a)(15)(H), and that under 8 C.F.R. 211.1(b)(1) they should not, in any event, be admitted to resume previous employment at places where the Secretary of Labor has determined that a labor dispute exists.

On May 13, 1970, the district court granted the motion of four Texas farm workers to intervene as



plaintiffs.[8] On June 8, 1970, the parties entered into a stipulation of facts (Govt. Pet. App. 34–37). The administrative interpretation of the immigration laws, pursuant to which the Service has historically readmitted alien commuters to the United States, is described in the following paragraph of the stipulation (*id.* at 34–35):

> 2. The defendants and their predecessors have interpreted those laws as authorizing the admission of alien commuters. Such commuters are aliens who were originally admitted as permanent resident aliens with immigrant visas but who reside in adjacent countries and come to the United States daily or at other intervals for employment. Every alien admitted as an immigrant is issued an Alien Registration Receipt Card (Form I–151). The defendants recognize such a card as evidence of the holder's lawful admission to the United States for permanent residence and his compliance with alien registration requirements, and also permit its use, under prescribed conditions, as a document entitling him to readmission to the United States as a returning resident immigrant, if he is otherwise admissible. Commuters are readmitted to resume or to seek work upon presentation of Form I–151 unless defendants find that they did not work at regular and stable employment in the United States within six months, in which event defendants consider the

[8] These intervenors are the only petitioners in No. 73–480. While both the original plaintiffs and the intervening plaintiffs are respondents in No. 73–300, no appearance has been entered and no paper has been filed in this Court on behalf of the original plaintiffs.

> alien to have lost commuter status and to be not readmissible with Form I–151.

After cross-motions for summary judgment were filed, the district court granted the government's motion, denied the plaintiffs' motions, and dismissed the action (*id.* at 33).

2. On appeal, the court of appeals held that the Service's practice of admitting *daily* commuters as "special immigrants" is proper, but that the identical practice with respect to *seasonal* commuters is contrary to the terms of the Act (*id.* at 16–30). The court traced the history of the commuter system from the 19th Century, and found that the long history of administrative practice was "known to Congress" (*id.* at 27) when it enacted the present Immigration and Nationality Act of 1952.[9] Since the Act's text and legislative history are silent on the question of commuters (*id.* at 26), "it is fair to assume that the historic daily commuter practice * * * was expected to continue unchanged in the 1952 law" (*id.* at 27.)[10]

The court held, however, that the same inference could not be drawn with respect to seasonal commuters. It held that the seasonal commuter program "is not only recent in origin, but is so patently a

[9] The court cited S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 535–536, 616 (Govt. Pet. App. 27, n. 20).

[10] The court stated (Govt. Pet. App. 27):

> Where an administrative practice has continued in existence for over 45 years and has consistently been extended in the light of various immigration Acts which have never expressed any mention or disavowal of the practice, efforts to change or eliminate such a practice should be addressed to the Congress, not to the Courts.



> jerry-built patchwork, a synthetic construct hastily assembled after the termination of the bracero program [in 1964] in obvious contradiction to the legislative intent, that it cannot be given serious consideration as a meaningful guideline for the interpretation of the statute" (*id.* at 30). The court's impression of the seasonal commuter practice rests on its assumption that the class of seasonal commuters was "created" by the Service as "a new class" "after the termination of the bracero program in 1964" (*id.* at 20), and that there followed a "metamorphosis" (*ibid.*) by which the former braceros were simply redesignated "seasonal commuters."

The court also reasoned that the Service's practice of admitting daily commuters could be squared with the statutory language, but that its identical practice with respect to seasonal commuters could not. Thus, "the concept of permanent 'residence' can be taken to include the place of work of a daily commuter," because he may be "fully integrated into the United States economy" (*id.* at 28); but treating *seasonal* commuters as immigrants who have been "lawfully admitted for permanent residence" (8 U.S.C. 1101(a)(27)(B)) "'makes nonsense'" of the statute (Govt. Pet. App. 21). Likewise, while the court concluded that seasonal commuters should properly be classified as nonimmigrants under 8 U.S.C. 1101(a)(15)(H) because they reside in a foreign country and come temporarily to the United States to perform temporary labor (*id.* at 22–23), a daily commuter may be treated differently in the court's view because "the

services he provides are not temporary" (*id.* at 23, n. 13).

The court recognized that "perpetuation of the daily commuter system is vital to the lives of thousands of daily commuters" and that "reversal of the present practice would cause severe dislocation and hardship" (*id.* at 28); it did not consider whether seasonal commuters would suffer similar "dislocation and hardship." The court also noted that the Secretary of State, in an affidavit filed in the district court (*id.* at 38–40), expressed the view that termination of the commuter system would "'adversely affect' our relations with our two neighbors" (*id.* at 29, n. 26); the court warned of "the strong possibility of retaliatory measures" by Canada and Mexico (*ibid.*). It construed the affidavit, however, to apply only to termination of the *daily* commuter system (*id.* at 21, n. 9); and it did not indicate whether retaliatory measures might result if only the seasonal program were stopped.

The court of appeals' decision, insofar as it held invalid the seasonal commuter program, conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Gooch* v. *Clark*, 433 F. 2d 74, certiorari denied, 402 U.S. 995, which upheld the validity of the Service's practice with respect to both daily and seasonal commuters. The government filed a petition for a writ of certiorari to review the court of appeals' judgment with respect to the seasonal commuters, urging that the conflict between the circuits should be resolved by this Court. We also acquiesced in the



granting of plaintiffs' conditional cross-petition to review the judgment below with respect to daily commuters, because of our view that the legal issues concerning the two classes of commuters are in most respects identical. This Court granted both petitions.

## SUMMARY OF ARGUMENT

### I

A. Commuters are properly classified as "immigrants" rather than "nonimmigrants." Plaintiffs claim that commuters must be treated as nonimmigrants under 8 U.S.C. 1101(a)(15)(H)(ii), because they have a residence in Mexico or Canada that they have "no intention of abandoning," and they enter this country "temporarily * * * to perform temporary services or labor * * *." But even assuming, contrary to the Act's design, that nonimmigrant status can be forced upon an alien who has not sought it, plaintiffs' argument overlooks the final element of the definition—namely, that "unemployed persons capable of performing such service or labor cannot be found in this country * * *." If, as plaintiffs apparently concede, such unemployed persons *can* be found in this country, then the consequence is not that the commuters cannot enter the United States but rather that they are "disqualified by the very language of the subsection" from being classified as nonimmigrants. *Gooch* v. *Clark*, 433 F. 2d 74, 77 (C.A. 9), certiorari denied, 402 U.S. 995.

Moreover, the Service has consistently refused to grant nonimmigrant status under subsection (H)(ii)

to an alien seeking entry to perform temporarily a job of a permanent character. That view of the statute has been endorsed by Congress. Since commuters come to stable employment in this country, they are disqualified for nonimmigrant status on this ground as well.

B. Since the Act defines immigrant as an alien who is not a nonimmigrant, it follows that commuters are immigrants. Moreover, they have been lawfully admitted for permanent residence in the United States. Each commuter has complied in all respects with the qualitative and documentary requirements for admission as an immigrant, and each has in fact been admitted in that status in accordance with any applicable numerical limitations.

Upon such lawful admission, the immigrant acquires "the status of having been lawfully accorded the *privilege* of residing permanently in the United States as an immigrant" (8 U.S.C. 1101(a)(20); emphasis added). There is no requirement that he *exercise* that privilege in order to retain his status as a lawfully admitted immigrant. Thus, an alien's actual residence is immaterial to his status as having been lawfully admitted for permanent residence.

Like other immigrants with that status, the commuter may depart this country temporarily and may reenter it without regard to any numerical limitations and without the formal documentation that would otherwise be required. So long as the commuter's departure is a temporary one and is made without intention of abandoning his status as an alien lawfully admitted for permanent residence, he may be treated on reentry as "returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)), even if that "visit" was to his home on the other side of the border. The statute does not require that the alien be returning to an actual residence in this country.



Though 8 U.S.C. 1181(b), which authorizes reentry without formal documentation, refers to "returning resident immigrants," that phrase is followed by "as defined in section 1101(a)(27)(B) of this title." The reference to 8 U.S.C. 1101(a)(27)(B) makes clear that "returning resident immigrants" is merely a shorthand designation of "immigrant[s], lawfully admitted for permanent residence, who [are] returning from a temporary visit abroad" (*ibid.*), a class to which commuters belong. This view is consistent with the legislative history of Section 1181(b).

C. The provisions of 8 U.S.C. 1182(a)(14) exclude from admission to this country aliens seeking entry to perform skilled or unskilled labor, unless the Secretary of Labor certifies that there are not sufficient workers in the United States to perform such labor and that employment of aliens would not adversely affect the wages and working conditions of American workers. While that exclusion—changed to its present form in 1965—would apply to an alien now seeking initial entry as an immigrant, it does *not* apply to one who has *previously* been lawfully admitted for permanent

residence and who is returning from a temporary visit abroad. Thus, that section may effectively foreclose the acquisition of commuter status by an alien who does not now have it; but it does not, and was not intended to, affect the right of existing commuters to reenter as returning lawfully admitted immigrants.

## II

The administrative practice of readmitting alien commuters without requiring the presentation of formal documentation has been consistently followed for 47 years. During that time, Congress was repeatedly advised of the practice and frequently acknowledged its understanding of it. Although the Act was revised several times, and although numerous unsuccessful efforts were made to change the commuter system, Congress never disapproved the administrative interpretation and indeed indicated approval of it on several occasions.

This pattern of congressional acquiescence in and approval of the commuter system amounts, we submit, to ratification of the long-standing administrative practice. Any change in the existing system must, in these circumstances, be initiated by Congress. That body alone has the institutional capacity to weigh all the complex considerations of domestic economic and labor policy that bear upon the future of the commuter program; to accommodate the conflicting interests of American workers, alien commuters, and agri-



cultural employers; and to take full account of the adverse impact upon this country's relations with Mexico and Canada which the Secretary of State believes may attend the termination of the program.

## III

The seasonal commuter program is legally and historically indistinguishable from the daily commuter program, and the two must stand or fall together. The court of appeals' holding that the seasonal commuter program was created after the 1964 termination of the bracero program as an effort to circumvent the will of Congress, and its suggestion that the Service simply redesignated the former braceros as seasonal commuters, rests on fundamental misconceptions concerning the bracero and commuter programs.

The seasonal commuter system was in effect and fully available to those who could qualify long before the bracero program ended. Though many braceros became commuters as the bracero program neared its conclusion, the two classes were not identical. The commuters, unlike the braceros, were able to acquire their status only by complying with all the requirements for admission to this country as immigrants and by being lawfully admitted with the privilege of residing permanently in the United States.

Contrary to the view of the court of appeals, the present statute leaves no room for treating the two classes of commuters differently.

## ARGUMENT

### I

### ALIEN COMMUTERS ARE PROPERLY CLASSIFIED UNDER THE 1952 ACT AS IMMIGRANTS, LAWFULLY ADMITTED FOR PERMANENT RESIDENCE IN THE UNITED STATES, WHO ARE RETURNING FROM A TEMPORARY VISIT ABROAD

Plaintiffs argue that the Service's treatment of alien commuters as "special immigrants" under 8 U.S.C. 1101(a)(27)(B) is improper, because (1) commuters are in fact "nonimmigrants," (2) they have not been "lawfully admitted for permanent residence" in this country, and (3) they are not, on reentry, "returning from a temporary visit abroad * * *." The court of appeals accepted each of these contentions with respect to seasonal commuters, but rejected each with respect to daily commuters. We submit that none of the arguments has merit with respect to either daily or seasonal commuters, and that the Service's long-standing interpretation of the Immigration and Nationality Act of 1952 is in all respects correct.

#### A. *Commuters Cannot Properly Be Classified as "Nonimmigrants"*

Since the Act defines "immigrant" as "every alien except an alien who is within one of the * * * classes of nonimmigrant aliens" (8 U.S.C. 1101(a)(15)), a commuter must be treated as an immigrant unless he is properly classified as a nonimmigrant. We therefore consider first plaintiffs' contention (Pl. Pet. 9–10), accepted by the court of appeals with respect to seasonal commuters (Govt. Pet. App. 22–23), that



alien commuters cannot be readmitted to this country as special immigrants because they are in fact "nonimmigrants."

1. Plaintiffs rely on the language of 8 U.S.C. 1101(a)(15)(H), which establishes the following class of nonimmigrants:

> [A]n alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor, if *unemployed persons capable of performing such service or labor cannot be found in this country* * * *. [Emphasis added.]

The italicized phrase "is part of the *definition* of aliens falling within the (H)(ii) class of nonimmigrants." *Gooch* v. *Clark*, 433 F. 2d 74, 78 (C.A. 9), certiorari denied, 402 U.S. 995 (emphasis in original). If commuters could in fact bring themselves within that definition, they would be able to obtain nonimmigrant visas and enter this country without regard to the substantive and numerical restrictions on the admission of immigrants.

But plaintiffs do not argue that commuters fit the entire definition; indeed, the heart of their claim is that "unemployed persons capable of performing such labor or service" in fact *can* "be found in this country" (8 U.S.C. 1101(a)(15)(H)(ii)). Thus, plaintiffs' contention must be that commuters fit all but the final portion of the definition; they argue, however, that commuters must nevertheless be treated as nonimmigrants, and that their failure to satisfy the final part of the definition simply means that they cannot *enter* as nonimmigrants.

This is an untenable reading of the statute. It would create a new class of alien who is neither an immigrant nor yet quite a nonimmigrant. The Act, however, provides for no such state of limbo. It divides the universe of aliens into nonimmigrants and immigrants: one who is not a nonimmigrant is necessarily an immigrant, and that applies to commuters no less than to other aliens. Plaintiffs cannot have it both ways. Either commuters are within the class of nonimmigrants as defined in the Act, and are therefore free to enter the United States in that status, or they are immigrants and may enter this country, if at all, only in that status.

Thus, if, as plaintiffs implicitly suggest, unemployed laborers can be found in this country to perform the service or labor now performed by commuters (see *Gooch* v. *Clark, supra*, 433 F. 2d at 78), then the consequence is not that the commuters are nonimmigrants who are barred from entry because they are not *quite* within the statutory definition. The consequence is, rather, that the commuters must be classified as immigrants, because they are, as the Ninth Circuit held in *Gooch*, "disqualified by the very language of the subsection" from being classified as nonimmigrants (433 F. 2d at 77).

This interpretation of the statute is consistent with the legislative purpose. The H category of nonimmigrant temporary workers was created by the 1952 Act. As we show in greater detail below, Congress was well aware that commuters had been treated as immigrants under prior legislation, and the legislative history of the 1952 Act makes clear that Congress intended no change in the commuter practice. Rather, as the court in *Gooch* correctly concluded, "[s]ubsection (H)(ii) * * * was intended to confer nonimmigrant status on certain aliens who were needed in the American labor force *but who, unlike commuters, would be unable to achieve admittance under immigrant status*" (433 F. 2d at 78; emphasis added).



2. There is another reason why commuters do not fall within the definition of nonimmigrant. Subsection (H)(ii) applies only to an alien who comes "temporarily to the United States to perform temporary services or labor * * *." The Service has consistently construed the subsection as not encompassing an alien who, like the commuter, comes to this country to perform a job of a permanent character, even though the period of his service is limited.[11] *Matter of Contopoulos*, 10 I&N Dec. 654; see 1 Gordon and Rosenfield, *Immigration Law and Procedure*, §2.14a(2). The Service's similar reading of an identical "temporary service" provision in former subsection (H)(i) was endorsed by Congress when it amended that

[11] The court of appeals held that, because a daily commuter works at "a steady job throughout the year," "the services he provides are not temporary" and he therefore is not within the (H)(ii) class of nonimmigrants (Govt. Pet. App. 23, n. 13). It also held, however, that "commuters who work as agricultural laborers only during the agricultural season provide only temporary services or labor" and therefore do fall within subsection (H)(ii) (*id.* at 22–23). But the seasonal commuter's job may be as "steady" as the daily commuter's; he may have regular and recurring employment throughout the entire season in which his services are needed. There is no support for the court of appeals' view that a seasonal commuter's job is of a less permanent character than that of a daily commuter.

subsection in 1970 (84 Stat. 116) to permit certain professionals to enter temporarily for the purpose of performing jobs of "a continuing or permanent nature." H. Rep. No. 91–851, 91st Cong., 2d Sess., p. 4.[12]

No change was made to the identical wording of subsection (H)(ii), but a bill (H.R. 981, 93d Cong., 1st Sess., § 2) that would make a similar change in (H)(ii) has passed the House and is pending in the Senate. In recommending approval of this measure, the House Judiciary Committee again stated that present law does not permit an alien to be treated as a nonimmigrant under (H)(ii) if his job is permanent in nature. H. Rep. No. 93–461, 93d Cong., 1st Sess., p. 16.

Commuters coming to stable employment in the United States thus cannot qualify for (H)(ii) immigrant status.[13]

3. Finally, even if a commuter satisfied the entire (H)(ii) definition of nonimmigrant, that status could not properly be forced upon him. The Act provides that "[e]very alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer * * * and the immigration officers * * * that he is entitled to a nonimmigrant status under section 1101(a)(15)" (8 U.S.C. 1184(b)). Nonimmigrant status must be solicited and demonstrated by an alien, and approved by the consular and immigration authorities, or else the Act's presumption controls and he continues in the status of an immigrant. The Act does not contemplate that nonimmigrant status will be imposed upon any person who has not applied for it.[14]

Before an alien can be classified as a nonimmigrant under subsection (H)(ii), his prospective employer must submit a petition on his behalf under 8 U.S.C. 1184(c). If that petition is approved by the Service, the alien himself must then apply for nonimmigrant status and demonstrate to the American consul and the Service that he in fact qualifies for such status. See 1 Gordon and Rosenfield, *Immigration Law and Procedure,* § 2.14b. Unless a commuter seeks and obtains nonimmigrant status in accordance with these procedures, he may not be regarded as a nonimmigrant even if the (H)(ii) category might otherwise be available to him.

[12] The Committee Report stated that, "[u]nder present law, * * * an alien is not entitled to such nonimmigrant status even if coming to the United States temporarily if his employment will be in a position or occupation which is of a continuing or permanent nature. * * * This amendment [omitting "temporary" before "services"] is * * * intended * * * to lift the restriction on the temporary nature of the employment" (H. Rep. No. 91–851, 91st Cong., 2d Sess., pp. 4, 5).

[13] Even the amendment contemplated by H.R. 981 would not change the status of commuters unless unemployed persons could not be found to perform the work done by the commuters (see pp. 19–21, *supra*).

[14] The status of a resident alien may be adjusted on a compulsory basis from immigrant to nonimmigrant in certain limited circumstances (8 U.S.C. 1257(a)), but even then the alien may retain immigrant status if he waives all rights to which he would be entitled as a nonimmigrant (8 U.S.C. 1257(b)).

B. *Commuters Are Properly Treated Under the 1952 Act As Duly Admitted Immigrants Returning From a Temporary Visit Abroad*

If, as we have shown, alien commuters are not "nonimmigrants," they must be classified as immigrants (8 U.S.C. 1101(a)(15)). The remaining question is whether they may properly be treated as "special immigrants" under 8 U.S.C. 1101(a)(27)(B). If so, they may be readmitted without regard to the Act's numerical limitations (8 U.S.C. 1151(a)) and without the formal documentation that would otherwise be required of immigrants (8 U.S.C. 1181(b)).

*1. The commuter has been "lawfully admitted for permanent residence"; the statute does not require that he establish an actual residence in this country.*

A "special immigrant" under the Act includes "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)). Plaintiffs contend (Pl. Pet. 10–11), and the court of appeals held with respect to seasonal commuters (Govt. Pet. App. 21), that commuters do not fit this definition because they are not "lawfully admitted for permanent residence." Underlying both plaintiffs' contention and the court's holding is the erroneous assumption that, to retain the status of an immigrant "lawfully admitted for permanent residence," an alien must establish an actual residence in the United States.

"Lawfully admitted for permanent residence" is itself a term of art. It is defined by the Act as "the *status* of having been lawfully accorded the *privilege* of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed" (8 U.S.C. 1101(a)(20); emphasis added). We have emphasized the words "status" and "privilege" because in our view they are fundamental to an understanding of the statutory scheme. Upon lawful admission as an immigrant, an alien acquires a *status* which gives him the *privilege* of residing permanently in the United States. So long as that status is not changed, the alien who has been lawfully admitted for permanent residence retains the privilege of establishing a permanent residence in this country.[15] However, there is nothing in this definition, or in any other provision of the statute, that conditions the grant of lawful immigrant status on the establishment of an actual residence in the United States.



Plaintiffs argue that the commuters' "status has changed because they have not assumed residence in the United States" (Pl. Pet. 11). But, as the Ninth Circuit correctly observed in *Gooch* v. *Clark, supra,* 433 F. 2d at 79, the reservation in 8 U.S.C. 1101(a)(20) concerning "such status not having changed" refers primarily to the change of status from that of an immigrant lawfully admitted for permanent residence to that of a nonimmigrant, pursuant to 8 U.S.C 1257. See *Matter of S.,* 6 I&N Dec. 392 (Attor-

[15] Since the commuter's status is tied to continued employment in this country, it has been the administrative view that such status is lost if the commuter is out of such employment for a period of six months, unless the unemployment was caused by uncontrollable circumstances, such as serious illness, disabling injury, or pregnancy. *Matter of D.C.,* 3 I&N Dec. 519; *Matter of L.,* 4 I&N Dec. 454 (1951); *Matter of Burciaga-Salcedo,* 11 I&N Dec. 665 (1966); *Matter of M.D.S.,* 8 I&N Dec. 209; *Matter of Wighton,* 13 I&N Dec. 683.

ney General); *Matter of M.P.*, 9 I&N Dec. 747. Lawful residence status may also be lost if the returning immigrant reenters surreptitiously. *Matter of M.*, 5 I&N Dec. 642. And an alien with lawful residence status may be refused readmission if his reentry is barred on a substantive ground specified in the statute. *United States ex rel. Claussen* v. *Day*, 279 U.S. 398; *United States ex rel. Karpay* v. *Uhl*, 70 F.2d 792 (C.A. 2). But there is no basis in the statutory language or purpose for an assumption that status as an immigrant lawfully admitted for permanent residence is lost or abandoned by failure to establish a home in the United States.

A person wishing to acquire 'the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant" (8 U.S.C. 1101(a)(20)), must satisfy any applicable numerical restrictions on the entry of immigrants (8 U.S.C. 1151(a)). He must also comply with comprehensive qualitative requirements such as those relating to health, morals, and economic status (8 U.S.C. 1182). And he must obtain an immigrant visa, after satisfying an American consul that he has complied with the prescribed numerical and qualitative restrictions (8 U.S.C. 1181(a), 1201). In his application for an immigrant visa, the prospective immigrant must state "whether or not he intends to remain in the United States permanently" (8 U.S.C. 1202(a)). But the statute does not declare or imply that he cannot be granted lawful status as an immigrant if he does *not* intend to reside permanently in the United States; nor does it provide that one who has been lawfully admitted as an immigrant will lose that status if he does not remain in the United States permanently or if he does not establish a permanent residence in the United States.



Having complied with the numerical restrictions and substantive requirements of the Act, having obtained an immigrant visa from an American consul, and having been lawfully admitted to the United States as an immigrant, the alien acquires a status that entitles him to several significant benefits. He may remain in the United States indefinitely; he is free to work in this country; he may return to this country after a temporary absence abroad; and he has the privilege of establishing a permanent residence in the United States. These benefits have been available to alien commuters since the inception of the commuter program in 1927.

What plaintiffs and the court of appeals have overlooked is that the commuter, whether daily *or* seasonal, has acquired, in accordance with all the statutory requirements, the *status* of an immigrant, with the attendant *privilege* of establishing a permanent residence in the United States. That status, together with the privilege, is retained unless it is abandoned or forfeited in the manner prescribed by law. As the Ninth Circuit correctly held in *Gooch, supra*, 433 F. 2d at 79:

> [T]he definition [of "lawfully admitted for permanent residence"] refers not to the actuality of one's residence but to one's *status* under the immigration laws. Commuters have been accorded the privilege of residing permanently in

the United States * * *. Their disinclination to exercise that privilege is of no moment.

The court of appeals in this case, persuaded by the dissenting opinion in *Gooch*, 433 F. 2d at 83–85, concluded that the Service's reading of "lawfully admitted for permanent residence" might produce incongruities if applied to other sections of the Act (Govt. Pet. App. 21).[16] We acknowledge that the commuter enjoys a unique status, and we read the statute in the context of that status, deeply rooted in long administrative practice (see pp. 39–47, *infra*), sanctioned and ratified by Congress as embodying the legislative will (see pp. 47–63, *infra*).

Whether the statutory phrase must be read to include commuters in contexts other than the commuter's status for purposes of readmission to the United States has not been presented to the Service and need not be resolved in this case. The interpretation of the phrase in other sections of the Act will, of course, depend upon the legislative purpose expressed by those sections. It is enough to say in the context of this case that the Service's treatment of commuters on reentry to this country is fully consistent with the statutory language and the congressional will.

[16] The dissenter in *Gooch* argued that, if "lawfully admitted for permanent residence" covers alien commuters in the context of 8 U.S.C. 1101(a)(27)(B), so that they may be readmitted without regard to numerical limitations and formal documentation, then the phrase must be read similarly in all its other contexts, including provisions granting special preferences for admission, waivers of exclusion, and immunity from deportation for relatives of aliens lawfully admitted for permanent residence. The dissenting judge believed that to read these provisions as covering commuters "makes nonsense of the congressional policy" (433 F. 2d at 83).



2. *As immigrants lawfully admitted for permanent residence, alien commuters are entitled to reenter this country after a temporary absence.*

a. Plaintiffs argue (Pl. Pet. 11) that commuters may not be treated as special immigrants because they are not "returning from a temporary visit abroad" within the meaning of 8 U.S.C. 1101(a)(27)(B). They claim that, since the commuter's home is in Mexico, "his temporary visit abroad is from Mexico to the United States rather than from the United States to Mexico" (*ibid.*).

But, for an alien who has been lawfully admitted to this country as an immigrant, a return "from a temporary visit abroad" means only that the absence from this country must have been a temporary one and that the alien departed without any intention of abandoning his status as an alien lawfully admitted for permanent residence. The statutory requirement is satisfied if "the intention of the departing immigrant [is] * * * to return within a period relatively short, fixed by some early event." *United States ex rel. Lesto* v. *Day*, 21 F.2d 307, 308–309 (C.A.2).

Without such an intention to return, the visit abroad could not be characterized as temporary, and the alien's intention to abandon lawful residence status in this country would be established. *Gamero* v. *Immigration and Naturalization Service*, 367 F. 2d 123 (C.A. 9); *United States ex rel. Katnic* v. *Reimer*, 25 F. Supp. 925 (S.D. N.Y.), affirmed *per curiam*, 104 F. 2d 1022 (C.A. 2). Conversely, if the departing immigrant intends to return to the United States within

a "relatively short" time, his visit abroad is temporary, and his intention to retain lawful residence status is confirmed. Contrary to plaintiffs' suggestion, the statute does not require that the immigrant must be departing from or returning to a residence in the United States.[7]

b. A related contention (Pl. Pet. 10) is that commuters may not reenter without a valid immigrant visa in each case, because under 8 U.S.C. 1181(b) only "returning resident immigrants" can be excepted from the formal documentation requirements of 8 U.S.C. 1181(a). Plaintiffs rely on the Act's definition of "residence" as "the place of general abode," which in turn is defined as a person's "principal, actual dwelling place in fact, without regard to intent" (8 U.S.C. 1101(a)(33)).

This argument, however, ignores both the clear language of the statute and the history and purpose of Section 1181(b). That section gives the Attorney General authority to excuse from the formal documentation requirements, "returning resident immigrants, *defined in section 1101(a)(27)(B) of this title*" (emphasis added). The italicized reference is to the definition of "special immigrant" as one who has been "lawfully admitted for permanent residence, who is returning from a temporary visit abroad." The phrase "returning resident immigrants" is thus no more than

[7] We note that all members of the Ninth Circuit panel in *Gooch* v. *Clark*, *supra*, including the dissenting judge, agreed that a commuter's absence from the United States is a "temporary visit abroad" within the meaning of the Act (433 F. 2d at 79–80, 82, n. 1).



a shorthand device to designate, without repeating the entire statutory language, the class of immigrants defined precisely by Section 1101(a)(27)(B). There is no reason to think that the language used as shorthand was calculated in any way to constrict the class defined in Section 1101(a)(27)(B). Since, as we have demonstrated, commuters are within that class, the phrase "returning resident immigrants" cannot be read to exclude them.

The statutory definition of "residence" is thus beside the point. A "returning resident immigrant" is one "lawfully admitted for permanent residence," and the latter phrase, as we have shown, includes any alien who has been granted the privilege of residing permanently in this country, regardless of whether he has chosen to exercise the privilege.[18] We therefore

[18] The definition of residence as "place of general abode" and "principal, actual dwelling place in fact" (8 U.S.C. 1101(a)(33)) was derived from Section 104 of the Nationality Act of 1940, 54 Stat. 1138, and is still primarily relevant to the nationality portion of the Immigration and Nationality Act of 1952. Thus, an applicant for naturalization must establish *both* that he was lawfully admitted for permanent residence *and* that he "has resided continuously * * * within the United States" for specified periods thereafter (8 U.S.C. 1427(a)). Residency requirements appear elsewhere in the nationality sections of the Act. See, *e.g.*, 8 U.S.C. 1401 (a) (acquisition of citizenship at birth outside the United States); 8 U.S.C. 1421 (jurisdiction of naturalization courts dependent on residence of petitioner). The statutory definition of residence would be relevant to a commuter if he petitioned for naturalization, because he might be unable to satisfy the requirement of continuous residence after his lawful admission as an immigrant. See *In re Barron*, 26 F. 2d 106 (E.D. Mich.); *Petition of Wright*, 42 F. Supp. 306 (E.D. Mich); *Petition of Correa*, 79 F. Supp. 265 (W.D. Tex.).

need not rely on, though we do not necessarily reject, the court of appeals' view that "the concept of permanent 'residence' can be taken to include the place of work of a daily commuter" (Govt. Pet. App. 28).[19] The commuter may properly be readmitted without formal documentation regardless of whether his place of work may constitute his "residence"; what matters is his status as one who has been accorded the privilege of permanent residence, not his residence in fact.

This reading of Section 1181(b) is consistent with its history and purpose. The immigrant visa requirement was originally established by the Immigration Act of 1924. Section 13(b) of that Act, 43 Stat. 162, authorized waiver of the visa requirement for "immigrants who have been legally admitted to the United States and who depart therefrom temporarily." The contemporaneous administrative interpretation of that provision was that it applied to the commuter, since he had been "legally admitted" to this country and had "depart[ed] therefrom temporarily" (see pp. 42–43, *infra*). The commuter would otherwise have been required to obtain an immigrant visa for each reentry, a practical impossibility. His regular passage across the frontier was made possible under the 1924 Act by permitting him to use the border crossing identification card as evidence of his lawful residence status. The use of the border crossing identification card for this

[19] In our view, however, a seasonal commuter is not differently situated in this respect from a daily commuter. The former, no less than the latter, "has a permanent commitment and interest in the on-going vitality" of the community where he works and is "often fully integrated into the United States economy" (Govt. Pet. App. 28).



purpose was ratified by Congress in the comprehensive statutory revisions of 1940 and 1952 (see pp. 49–55, *infra*).

In its original form, Section 211(b) of the Immigration and Nationality Act of 1952, 66 Stat. 181, 8 U.S.C. 1181(b), authorized waiver of the normal documentary requirements for "aliens lawfully admitted for permanent residence who depart from the United States temporarily." This language was similar to that in the 1924 Act and obviously was designed to conform with the interpretation of the prior statute. After enactment of the 1952 Act, the Alien Registration Receipt Card, Form I–151, was designated as the resident alien's border crossing card (8 C.F.R. 211.11 (1952 rev.)), and it has been used for that purpose since then. This is the so-called "green card,"[20] which evidences the holder's status as an alien lawfully admitted for permanent residence, and which is used by the commuter as the prescribed reentry document.

The language of the original Section 1181(b) was changed to its present form in 1965 (P.L. 89–236, 79 Stat. 917), when far-reaching revisions in the immigration quota system were enacted. The legislative history of the 1965 Act contains no suggestion of an intention to make any change in the alien commuter system. It seems clear that the substitution of "returning resident immigrants, defined in section 1101(a)(27)(B)" for the earlier "aliens lawfully admitted for permanent residence who depart from the United

[20] This colloquial designation persists, although the card's color has been changed to blue in recent years.

States temporarily" was one of the "numerous technical and minor changes" made by the 1965 Act. See S. Rep. No. 748, 89th Cong., 1st Sess., p. 10. The 1965 revision of Section 1181, particularly in regard to subsection (a), was designed in part to conform to the changes made in the Act's quota system and the creation of the new category of "special immigrants." See *id.* at 23. In addition, as the House Committee observed, the language of Section 1181(b) was "restated and amended to ***broaden*** the authority of the Attorney General to waive documentation of a returning resident alien." H. Rep. No. 745, 89th Cong., 1st Sess., p. 21 (emphasis added).

It is clear that no major change in direction was contemplated by the 1965 revision of Section 1181(b). At most, it appears to have represented an effort to simplify and clarify the language of the statute. As the Ninth Circuit correctly held in *Gooch* v. *Clark, supra,* 433 F. 2d at 80, it cannot be concluded "from a minor and obscure change in the language of Section 1181(b) that Congress intended to end a well-known practice of the Service of more than 38 years, thereby grossly affecting some 40,000 commuters, their families, and their employers." [21]

c. Plaintiffs have yet another argument concerning the documentation required of reentering commuters.

[21] In arguing that Congress intended in 1965 to terminate the commuter program, plaintiffs rely on a single exchange between the Service's General Counsel and a legislative assistant for the House subcommittee, which occurred during hearings held two years earlier (Pl. Pet. 14–16). We show later in this brief (pp. 56–58, *infra*) that this "obscure colloquy" (*Gooch* v. *Clark, supra,* 433 F. 2d at 80) does not support plaintiffs' contention.



They claim (Pl. Pet. 11–12) that the regulation authorizing, pursuant to 8 U.S.C. 1181(b), the use of Form I–151 (the "green card") as a reentry document by "an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad" (8 C.F.R. 211.1(b)(1)), cannot be applied to commuters because they have no "unrelinquished lawful permanent residence" in this country.

This contention is insubstantial. The regulation was issued pursuant to 8 U.S.C. 1181(b) and must obviously be read in conformity with that section of the statute. While the regulation could be more artfully drafted, the phrase "unrelinquished lawful permanent residence" is meant to signify the unrelinquished *status* of an alien who has been granted the privilege of residing permanently in the United States. That is the statutory definition, and there is no reason to think that the regulation was calculated to apply to a narrower class than the statute authorizes.

It has been a matter of universal knowledge that for 47 years the Service has authorized the use of Form I–151, and its predecessor border crossing card, as an entry document for commuters. The Service has always regarded the commuter as returning to an unrelinquished permanent residence status in the United States, and it has properly construed its own regulation in harmony with that view. Moreover, the last sentence of 8 C.F.R. 211.1(b)(1)—barring use of Form I–151 by an alien entering to accept new employment at a "place where the Secretary of Labor has determined that a labor dispute exists"—was intended

to limit an employer's use of commuters as strike-breakers. See *Sam Andrews' Sons* v. *Mitchell*, 457 F. 2d 745 (C.A. 9); *Cermeno-Cerna* v. *Farrell*, 291 F. Supp. 521 (C.D. Cal.), vacated in part and remanded *sub nom. Giumarra Vineyards Corporation* v. *Farrell*, 431 F. 2d 923 (C.A. 9).[22] That confirms the Service's interpretation that the entire subsection applies to commuters.

In these circumstances, particularly in the light of the long and consistent practice, there is no reason to reject the Service's interpretation of its own regulation. It is unmistakably clear that the regulation was not designed, and has never been applied, to preclude the entry of commuters.

### C. *The Labor Certification Requirements of the Act Are Inapplicable to Those Who Have Achieved Commuter Status*

Another aspect of plaintiffs' argument is that the commuter status is inconsistent with, or subordinate to, the labor certification requirements of 8 U.S.C. 1182(a)(14), particularly since the amendment of that section in 1965. In its original form in the 1952 Act, the section excluded from admission to the United

[22] In the district court and the court of appeals, plaintiffs argued that the regulation should be read to preclude the entry of a commuter to work at a place where a labor dispute exists, even if the commuter has previously been employed there and would merely continue an existing employment relationship (see Govt. Pet. App. 17). The court of appeals did not reach the issue, and plaintiffs' petition does not present it for review in this Court. We note that this aspect of 8 C.F.R. 211.1(b)(1) was declared invalid by the Ninth Circuit in *Sam Andrews' Sons* v. *Mitchell*, *supra*.



States aliens seeking entrance "for the purpose of performing skilled or unskilled labor" if the Secretary of Labor certified that United States residents were available to perform such labor and that employment of aliens would adversely affect the wages and working conditions of workers in the United States similarly employed. The exclusion thus came into effect only if invoked by the Secretary of Labor. As amended in 1965, the exclusion applies *unless* the Secretary certifies that there are *not* sufficient United States workers and that employment of aliens would *not* adversely affect wages and working conditions in this country.

It is undoubtedly true that the labor certification requirement was fashioned as a protection for American labor. But Section 1182(a)(14), in both its original and its amended form, has never been applicable to all immigrants, or even to all immigrants who come to perform labor. Under its terms, the statute applies only to certain Western Hemisphere special immigrants, to immigrants in the third and sixth preferences (which relate to occupational skills), and to nonpreference immigrants. Not included in the groups specified in Section 1182(a)(14), and thus not subject to its proscription, are aliens lawfully admitted for permanent residence returning from a temporary visit abroad, and certain close relatives of American citizens and of resident aliens. See 1 Gordon and Rosenfield, *Immigration Law and Procedure*, § 2.40.

Upon his initial entry into the United States as an immigrant, the alien commuter must comply with all applicable requirements of the immigration laws, *in-*

*cluding* the labor certification requirement. Consequently, all aliens who have sought to establish commuter status after the effective date of the 1965 amendments, or who now seek to establish such status, can do so only upon a proper certification by the Secretary of Labor (unless they are excepted as close relatives of American citizens or of lawful resident aliens). But once he has acquired the status of an alien lawfully admitted for permanent residence, the commuter is no longer subject to the labor certification requirement when he reenters. The restrictions of Section 1182(a)(14) are inapplicable to him, because he is readmitted as an immigrant, lawfully admitted to the United States for permanent residence, who is returning from a temporary visit abroad.[23]

The Senate Committee Report on the 1965 Act declared that a major aim of the statute was "to protect the American labor market from an influx of * * * foreign labor." S. Rep. No. 748, 89th Cong., 1st Sess.,

[23] In *Amalgamated Meat Cutters and Butcher Workers* v. *Rogers*, 186 F. Supp. 114 (D. D.C.), the court held that aliens lawfully admitted for permanent residence are not affected by the labor certification provisions. It also held, incorrectly in our view, that commuters are not lawfully admitted for permanent residence because they do not actually reside here. It therefore ruled that commuters *would* be affected by the provisions of former Section 1182(a)(14). The case became moot before a final order could be entered or an appeal could be perfected. As recounted in the majority's opinion in *Gooch* v. *Clark*, *supra*, 433 F. 2d at 81, the Service disagreed with the *Amalgamated* decision, declined to follow it, and made known to Congress its opposition to the decision. The court in *Gooch* concluded that *Amalgamated* "was wrongly decided," and it could "find no evidence that Congress intended to adopt the decision in its 1965 amendments to the Act" (*id.* at 82).



p. 15. Similar views were expressed when Section 1182(a)(14) was originally enacted in 1952. See H. Rep. No 1365, 82d Cong., 2d Sess., p. 51; S. Rep. No. 1137, 82d Cong., 2d Sess., p. 11. As the language of the 1965 report implies, the underlying statutory purpose was to limit *new* admissions of alien laborers, not to foreclose the readmission of aliens already in the labor market who are returning to stable employment in this country. It is one thing to prevent an influx of foreign labor; it would be quite another to strip thousands of previously admitted commuting immigrants of their existing jobs. Congress clearly intended the former, but, contrary to plaintiffs' suggestion, there is no evidence that it intended the latter as well.

## II

### CONGRESS HAS BEEN AWARE OF, AND IN EFFECT HAS RATIFIED, THE LONG-STANDING ADMINISTRATIVE PRACTICE WITH RESPECT TO THE READMISSION OF ALIEN COMMUTERS

We have shown that alien commuters are properly readmitted to this country as special immigrants under the 1952 Act. That interpretation of the Act is fortified, we submit, by the 47 years of consistent administrative practice with respect to commuters, which has repeatedly been brought to the attention of Congress and which Congress has repeatedly approved and declined to change.

**A. *The Administrative Practice of Admitting Commuters Without Formal Documentation Has Been Consistently Followed for 47 Years and Is Entitled***

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*to Great Weight in Ascertaining the Congressional Intent*

1. The historical development of the alien commuter system has been the subject of numerous studies.[24] Ease of border crossing, including passage to jobs on both sides of the frontier, was an established practice in the 19th Century and the early years of the 20th Century (Western Hemisphere Report, p. 101). Indeed, the immigration statutes of that period directed the administrative authorities to prescribe rules that would facilitate travel to the United States from Canada and Mexico (Act of Feb. 5, 1917, § 23, 39 Stat. 874, 892; Act of Feb. 20, 1907, § 22, 34 Stat. 898, 905–906).

Pursuant to those directives, the immigration authorities prescribed an identification card for the use of "aliens and citizens who, residing on either side of the line, habitually cross and recross the border upon legitimate pursuits" (Immigration Rules of May 1, 1917, Rule 12, subd. 9, and Rule 13, subd. 3; Immigration Rules of July 1, 1925, Rule 3, subd. R; Immigration Rules of March 1, 1927, Rule 3, subd. Q). Since there were no numerical restrictions before 1921 on entry into the United States, aliens in Canada

[24] See, *e.g.*, Report of the Select Commission on Western Hemisphere Immigration, p. 101 (1968) (hereinafter "Western Hemisphere Report"); Note, *Aliens in the Fields: The "Green-Card Commuter" Under the Immigration and Naturalization Laws*, 21 Stanford L. Rev. 1750 (1969); Note, *Commuters, Illegals and American Farmworkers: The Need for a Broader Approach to Domestic Farm Labor Problems*, 48 N.Y.U. L. Rev. 439 (1973).



or Mexico could obtain such identification cards and freely cross the border to come to jobs in this country unless they were barred by some qualitative ground of exclusion.

Numerical restrictions on immigration were imposed for the first time by the Act of May 19, 1921, 42 Stat. 5. The Act did not, however, have any significant impact on entries from Canada and Mexico, because Section 2(a) of the Act exempted from its restrictions aliens who had previously resided in those two countries for one year.[25]

The temporary quota law of 1921 was succeeded by the Immigration Act of 1924, 43 Stat. 153, which introduced a number of new directives relevant to the traditional border traffic.[26] First, it classified all arriving aliens as either immigrants or nonimmigrants. An immigrant was defined as any alien coming to the United States except one within six enumerated nonimmigrant classes (Sec. 3, 43 Stat. 154). Second, it established quota limitations on the admission of immigrants based on national origin. Among the groups exempted from the quota limitations, and designated as "nonquota" immigrants, were natives of Western Hemisphere countries and "immigrant[s] previously lawfully admitted to the United States and returning from a temporary visit abroad" (Secs. 4, 5, and 11, 43 Stat. 155, 159). Third, the Act precluded the entry

[25] The Act of May 11, 1922, 42 Stat. 540, enlarged the requisite period of residence to 5 years.

[26] The 1924 Act did not repeal the basic 1917 Immigration Act, but imposed numerical and documentary restrictions in addition to the substantive restrictions established in the 1917 Act. Sec. 25, Immigration Act of 1924, 43 Stat. 166.

of an immigrant unless he had an immigration visa; but again it authorized exemption from this requirement of "immigrants who have been legally admitted to the United States and who depart therefrom temporarily" (Sec. 13(a) and (b), 43 Stat. 161–162).

When the 1924 Act became effective, the immigration authorities initially classified as nonimmigrant visitors for business under Section 3(2) of that Act, 43 Stat. 154, the alien commuters coming from Canada and Mexico to work in the United States. By virtue of that classification, the commuters were enabled to continue entering the United States freely, usually in possession of the border identification card sanctioned by the procedures which had previously been adopted. On further consideration, however, the administrative authorities reversed their position, and on April 1, 1927, the Acting Commissioner General of Immigration issued General Order No. 86,[27] in which the changed administrative interpretation was articulated.

The General Order specified that thereafter aliens residing in foreign contiguous countries who entered the United States to engage in or to seek employment would no longer be regarded as nonimmigrants but would be considered "immigrants" and would have to attain admission under that status. Those who achieved such admission would be permitted to enjoy the border crossing privilege to go to their employment and would be able to obtain border crossing identification cards identifying them as immigrants. Such aliens

[27] The relevant portions of General Order No. 86 are set forth in the Appendix to this brief, *infra*, pp. 83–84.



"will be considered as having entered for permanent residence" (App., *infra*, p. 84).

The change of interpretation reflected in General Order No. 86 generated protests and litigation. The protests included expressions of concern by the Canadian Government. In one of a series of diplomatic exchanges the Canadian Minister to Washington wrote to the Secretary of State on June 8, 1927:

> For many years there has been reciprocal free movement over the border between the United States and Canada, a movement freer and involving a larger number of people than that between any other two countries in the world. This freedom of movement has been an outstanding demonstration of the close connection and friendship existing between the people of the two countries. The boundary is of such a character that the communities situated close to it on both sides must have many common interests. In some of these border communities the relationship has been so intimate that residents on one side of the frontier have been in the habit of crossing daily to the other side to engage in employment. This practice, as you are aware, is of many years standing * * *. The practice rooted in this understanding and in the unique conditions of border intercourse on this Continent has continued to this day. It has been most marked in the area adjacent to Windsor and Detroit and in the Niagara region. Though a large majority of the individuals who so cross the border daily are Canadians entering the United States, the practice is reciprocal, and a considerable number of citizens of the United States come to Canada each working day. * * * [Foreign Relations of the United States, 1927, Vol. 1, p. 503.]

Eventually, the United States assured Canada that a successful effort had been made to facilitate retention of the commuter status by those previously enjoying it (*id.* at 510).

This Court subsequently ruled that an alien coming to perform labor was properly classified as an immigrant and not as a nonimmigrant visitor for business, and that "the departmental regulation [General Order No. 86] * * * is in accordance with the Congressional intent." *Karnuth* v. *United States ex rel. Albro,* 279 U.S. 231, 244.

2. The administrative practice sanctioning the entry of alien commuters was inaugurated by General Order No. 86 in 1927. The chief impact of that regulation was to curtail the entry of Europeans domiciled in Canada and Mexico, who could not readily qualify as immigrants because of the quota limitations established by the 1924 Act. (In this class were the unsuccessful litigants in *Albro.*) For natives of Canada and Mexico, the commuter system established by General Order No. 86 posed no substantial difficulty. As natives of the Western Hemisphere, they were exempt from quota limitations, and it was a simple matter for them to conform to the requirements of General Order No. 86 by entering the United States with nonquota immigration visas in conformity with law, obtaining a border crossing identification card as immigrants, and thereafter returning regularly to their jobs in the United States.



In the ensuing years, alien commuters continued to enter on the basis of the administrative interpretation and practice first enunciated in General Order No. 86. The regulation was codified, without substantial change, in 1930 and was carried forward in subsequent revisions of the regulations before 1952.[28] The alien commuter practice also was reviewed and endorsed by published administrative decisions. *Matter of D.C.,* 3 I&N Dec. 519 (1949); *Matter of L.,* 4 I&N Dec. 454 (1951).[29]

3. The alien commuter practice was again evaluated by the administrative authorities following enactment of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101, *et seq.,* a comprehensive recodification of the immigration and nationality laws. Responding to suggestions that the 1952 Act had somehow eliminated the alien commuter, the Board of Immigration Appeals reaffirmed the continuing vitality of the commuter practice. *Matter of H.O.,* 5 I&N Dec. 716 (1954). In that decision, the Board comprehensively reviewed the development and maintenance of the alien commuter program, discussed the legislative history and structure of the 1952 Act, and found that Congress was aware of the alien commuter practice and had no intention of disturbing it.

In a series of published decisions, the administrative authorities thereafter repeatedly reaffirmed their

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[28] Immigration Rules of Jan. 1, 1930, Rule 3, subd. c; 8 C.F.R. 3.6 (First ed., 1939); 8 C.F.R. 110.6 (1947 rev.)

[29] An editor's note (4 I&N at p. 456) also cited a previous unreported decision to the same effect in 1946, approved by the Attorney General in 1947.

adherence to the alien commuter concept. *Matter of M.D.S.*, 8 I&N Dec. 209; *Matter of Bailey*, 11 I&N Dec. 466; *Matter of Burciaga-Salcedo*, 11 I&N Dec. 665; *Matter of Smith*, 11 I&N Dec. 738; *Matter of Gerhard*, 12 I&N Dec. 556; *Matter of Wighton*, 13 I&N Dec. 683; *Matter of Hoffman-ArVayo*, 13 I&N Dec. 750.[30]

The contention that the commuter interpretation was abandoned, because the regulation dealing with alien commuters was not republished when the administrative regulations were extensively revised following the adoption of the 1952 Act, was properly rejected by the Ninth Circuit in *Gooch* v. *Clark, supra*, 433 F. 2d at 79, n. 17. The commuter practice was then a well-known, long-established concept, spelled out and ratified in published administrative decisions. The revisers of the regulations may have concluded that there was no need for continuation of a specific regulation. In any event, the continued administrative adherence to the commuter interpretation was definitively asserted by the Board of Immigration Appeals a year later in *Matter of H.O.*, 5 I&N Dec. 716, and reiterated in the series of subsequent decisions noted above. The Board of Immigration Appeals speaks for the Attorney General, and those decisions that it designates as precedents are binding on the Service "in all proceedings involving the same issue or issues" (8 C.F.R. 3.1(g)).

[30] Cf. *Matter of Weindl*, 12 I&N Dec. 621 (inadmissible on substantive grounds); *Matter of Moore*, 13 I&N Dec. 711 (same); *Matter of Estrada-Tena*, 12 I&N Dec. 429 (same).



4. This pattern of administrative interpretation, publicly announced and consistently maintained for a period of 47 years, and regularly made known to Congress (see (pp. 47–63, *infra*), cannot be lightly disregarded. Familiar principles counsel that such a solidly established and recognized practice is entitled to great weight and should not be overturned unless it is clearly wrong. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315; *United States* v. *Bergh*, 352 U.S. 40, 46–47; *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 179.

### B. *Congress Was Repeatedly Advised of The Administrative Interpretation, Never Disapproved It, Indeed Indicated Approval of It on Several Occasions, and In Effect Has Ratified It.*

Even had Congress remained silent and inactive in the face of 47 years of consistent administrative practice, there would have been reason to infer its approval of that practice. But there is no need to rely upon inference from silence, for there is abundant evidence of congressional awareness and assent to the administrative interpretation. We do not mean to suggest that approval of the commuter program was unanimous. From time to time, measures to end that program were introduced by individual members of Congress, particularly during periods of economic distress. But none of those measures was enacted.

1. *1927–1940.*

a. In 1929, shortly after the promulgation of General Order No. 86, a bill was introduced for the purpose of assuring the right of temporary entry for

aliens coming to work in this country. A subcommittee of the Senate Immigration Committee held a public hearing on this bill (H.R. 16927, 70th Cong., 2d Sess.) on February 25, 1920. During the hearing, there was considerable discussion of the new commuter program, of litigation then pending in the courts, and of the needs of the communities in Michigan and New York adjacent to the border. A long letter from the Secretary of Labor, then responsible for the administration of the immigration laws, was inserted in the record, fully explaining the background, legal justification, and procedural implementation of the newly-adopted commuter regulation. The Committee recessed without taking any action and we have found no indication of any further consideration of this measure.

b. In 1934, there was consideration of H.J. Res. 288, 73d Cong., 2d Sess., which sought "to temporarily restrict habitual commuting of aliens" commuting daily or at frequent intervals. The House Immigration Committee felt that the entry of Canadian commuters, "who apparently now have a legal status," was detrimental to the economic opportunities of American citizens and resident aliens; it favored a temporary cessation of their entry "during this present period of economic maladjustment." H. Rep. No. 1236, 73d Cong., 2d Sess., pp. 2, 4. The measure was not adopted by Congress.

c. The following year another bill, H.R. 4340, 74th Cong., 1st Sess., sought permanently to prevent the entry of alien commuters coming across the border to work "regularly, daily or otherwise." The bill would have required commuters to possess an immigration



visa or reentry permit on each reentry. Again, there was a favorable report by the House Immigration Committee, which urged it as a measure to alleviate widespread domestic unemployment. H. Rep. No. 1276, 74th Cong., 1st Sess. Again, the legislation was not approved by Congress.

d. Two years later, a similar bill was introduced to prohibit aliens living in contiguous countries from crossing the border to work or to seek work. H.R. 3679, 75th Cong., 1st Sess. The House Immigration Committee favored the enactment of this bill to aid in alleviating widespread domestic unemployment. It pointed out that, "[u]nder existing law and pursuant to court interpretations thereof, these * * * United States workingmen who commute across the international boundary lines regularly between their homes and places of employment, are considered immigrants, but their commuters' status is recognized * * * by means of so-called identification cards which permit holders to cross the boundaries to engage in existing employment or to seek employment within the United States." H. Rep. No. 159, 75th Cong., 1st Sess., p. 2. Again, Congress refused to approve the proposal.

2. *Alien Registration Act of 1940.*

A significant legislative development took place in the consideration of the bill (H.R. 5138, 76th Cong., 1st Sess.) that ultimately became the Alien Registration Act of 1940 (the "Smith Act"), 54 Stat. 670. This bill incorporated numerous provisions dealing with national security, alien registration, and immigration. In

its original form, Section 13 of the bill made it unlawful for any alien resident of a contiguous country to cross the border for the purpose of working or seeking work in this country. Hearing before Subcommittee No. 3, House Judiciary Committee, 76th Cong., 1st Sess., on H.R. 5138 (Ser. No. 3, April 12 and 13, 1939).

At the hearing there was strong opposition to this aspect of the bill by the Department of State. The Department introduced into the record two communications from Secretary of State Cordell Hull (dated March 27, 1939, and April 13, 1937) stating that the enactment of this measure would adversely affect our relations with Canada and Mexico and could lead to retaliatory action against American citizens (*id.* at 59–62). James L. Houghteling, then Commissioner of Immigration and Naturalization, also opposed this provision in the bill (*id.* at 66). When this opposition was called to the attention of its sponsor, Representative Smith, he stated (*id.* at 74):

> I do not think that is very essential to the purpose of the bill, Mr. Chairman. I put it in there because I have understood that there is a good deal of that on the Mexican border, people coming over for the day and going back at night and taking work away from American citizens. But I do not think it is essential to the underlying purposes of this bill.

In favorably reporting the Smith Bill, the House Judiciary Committee deleted the provision proscribing the entry of commuters. The Committee explained (H. Rep. No. 994, 76th Cong., 1st Sess., p. 5):



> Section 13 * * * was eliminated because of the opposition of the State Department because of its contravention of treaty obligations.

In the bill's subsequent legislative progress, there was no further mention of any restriction against alien commuters. S. Rep. No. 1154, 76th Cong., 1st Sess.; S. Rep. No. 1721, 76th Cong., 3d Sess.; S. Rep. No. 1796, 76th Cong., 3d Sess. The Conference Committee added a provision, enacted as Section 30 of the Act, that precluded the entry of any alien who did not present a visa, a reentry permit, "or a border-crossing identification card." H. Rep. No. 2683, 76th Cong., 3d Sess., p. 5. Although the Conference Report does not explain this change, the earlier developments indicate that it was intended as a recognition and endorsement of the alien commuter practice. In any event, the alien commuter system continued to operate, and the administrative authorities thereafter designated the document they presented as a resident alien's "border crossing identification card." 8 C.F.R. 110.54, *et seq.* (1941 rev.); 8 C.F.R. Part 166 (1944 rev.).

3. *Act of 1952.*

Plaintiffs rest much of their argument in this case on the assumption that statutory revisions made by Congress in enacting the Immigration and Nationality Act of 1952 were intended to end or modify the alien commuter system. The court of appeals rejected this hypothesis (Govt. Pet. App. 26), and it was also rejected by the Ninth Circuit in *Gooch* v. *Clark, supra,* 433 F. 2d at 77. Indeed, it is quite clear that the legislative history of the 1952 Act points in the opposite direction; it indicates that Congress was fully

aware of the alien commuter program and did not intend to modify it.

The 1952 Act was the result of a four-year study conducted by the Senate Judiciary Committee, whose 925 page report was published as S. Rep. No. 1515, 81st Cong., 2d Sess. (the Omnibus Study Report). This report is a vital part of the legislative background of the Immigration and Nationality Act of 1952. With a few immaterial variances, the bill introduced on the basis of the Omnibus Study Report (S. 3455) contained the same sections that were enacted in 1952 as Sections 101(a)(15)(H)(ii), 101(a)(20), 101(a)(27)(B), 101(a)(33), 211(b), and 212(a)(14) of the Immigration and Nationality Act.[31] Consequently, what the Senate Committee said about commuters in S. Rep. No. 1515 is an authoritative guide to the construction of those sections of the Act.

The Report said about "[b]order crossers" (at 535–536; emphasis added):

> In order to facilitate traffic on the Canadian and Mexican borders, and ease, to some extent, the burden on the immigrant inspectors at the ports of entry and departure, two types of border-crossing identification cards have been instituted under the authority of section 30 of the Alien Registration Act of 1940: One for resident aliens and the other for nonresident aliens.

[31] S. 3455 was introduced by Senator McCarran on April 20, 1950, the day the Omnibus Study Report was published. That bill was reintroduced in the next Session as S. 716, 82d Cong., 1st Sess., and was again reintroduced at the beginning of the 1952 session as S. 2550. Its companion bill, H.R. 5678, was enacted into law.



> *A resident alien's border-crossing identification card is a document which may be issued to*
>
> (1) a lawfully resident alien who wishes to visit Canada or Mexico for a period or periods of less than 6 months, which may be presented by him as prima facie evidence that he is returning to a lawful permanent residence, and
>
> (2) *an alien (the so-called commuter) who has been admitted for lawful permanent residence but who resides in foreign contiguous territory and is employed in the United States.*
>
> * * * * *
>
> The following border crossers, in the absence of a valid visa or reentry permit, must have in their possession an alien's border-crossing identification card: (1) Lawfully resident aliens of the United States who wish to visit in Canada or Mexico for a period or periods of less than 6 months, (2) *an alien lawfully admitted to the United States for permanent residence but who resides in contiguous territory of Canada or Mexico and is employed in the United States; or* (3) citizens of Mexico who wish to enter the United States for a period or periods of not more than 29 days.

In discussing the various "nonimmigrant" classes of aliens, S. Rep. No. 1515 conversely stated (at 616; emphasis added):

> [Nonimmigrant a]liens in Canada or Mexico continually cross our borders. To facilitate inspection at ports of entry provision is made for them to apply at American consulates for border-crossing cards * * *.
>
> Cards [for nonimmigrant border crossers] will not be issued to aliens who appear to the

consul to be immigrants rather than nonimmigrants, to aliens who intend to cross the border and remain more than 29 days, *or to aliens who have been admitted into the United States for permanent residence. Aliens in the last category who cross the borders frequently are known as commuters and are not nonimmigrants and they must apply for resident alien's border-crossing cards at the appropriate office of the Immigration and Naturalization Service.*

The Omnibus Study Report thus reflects Congress's understanding that the immigration authorities treated alien commuters as lawfully admitted "immigrants." Most significantly, the Report expressed no dissatisfaction whatever with the established administrative practice of issuing border-crossing identification cards (identifying the holders as lawfully admitted immigrants) to alien commuters.[32] Nor is there any indication whatsoever in any other part of the legislative history that Congress was in any way dissatisfied with the administrative practice of treating alien commuters as entitled to "immigrant" status and as retaining their status when they made temporary departures to return to their homes.

S. Rep. No. 1515 contains extensive discussion of immigration problems, and every exposition of an administrative procedure closes with the Committee's conclusion and recommendations. When the Committee was dissatisfied with an existing statute it recommended amendment, and when it was dissatisfied with

[32] By contrast, the Report was quite critical of the loose issuance of border-crossing identification cards to "nonimmigrants." See S. Rep. No. 1515, p. 536.



an administrative practice it condemned it.[33] There is not the slightest hint in the Omnibus Study Report of disapproval of the commuter practice. On the contrary, the Committee's comments reflect recognition and approval of the administrative interpretation.

It is significant, moreover, that Section 212(a)(20) of the 1952 Act, 8 U.S.C. 1182(a)(20), carries forward and still retains the Alien Registration Act's recognition of a "border crossing identification card" as an acceptable entry document. And Section 101(a)(6) of the 1952 Act, 8 U.S.C. 1101(a)(6), defines a border crossing identification card as a document of identity issued to "an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory." In short, it is clear that the 1952 Act was not designed to disturb the long-established commuter practice.

4. *The 1965 amendments.*

Plaintiffs argue (Pl. Pet. 13–16) that the 1965 amendment to 8 U.S.C. 1181(b) was intended to end or curtail the commuter program. As we discussed above (pp. 32–34, *supra*), Section 1181(b) originally authorized an exemption from the normal documentation requirements for "aliens lawfully admitted for permanent residence who depart from the United States temporarily." That language was changed in 1965 to "returning resident immigrants, defined in

[33] See, *e.g.*, S. Rep. No. 1515, pp. 538–539, 556–558, and especially 611. The last cited page contains a condemnation of "preexamination," a Service innovation described at pp. 603–605. Like the commuter system, it had not been expressly authorized by statute.

section 1101(a)(27)(B)." We have already shown that the change does not affect commuters, because they fall within the class described in Section 1101(a)(27)(B).

Plaintiffs argue, however, that the change was meant to affect the practice of admitting commuters. They rely for this position on a 1963 discussion between L. Paul Winings, then General Counsel of the Service, and Walter Besterman, then a legislative assistant of the House Judiciary Committee. This discussion, characterized by the court in *Gooch* as "an obscure colloquy" (433 F. 2d at 80), occurred during the course of Hearings on Population and Immigration Problems conducted in 1962 and 1963 by Subcommittee No. 1 of the House Judiciary Committee, 88th Cong., 1st Sess. (The discussion of commuter workers appears in Special Series No. 11 and is quoted in part at Pl. Pet. 15.)

The 1963 discussion is indeed a slender reed on which to rest an inference of legislative intent. We are puzzled by plaintiffs' assertion (Pl. Pet. 15, n. 1) that Mr. Besterman "was speaking on behalf of the Subcommittee," presumably in rejecting the administrative practice with respect to commuters. The record does show that Mr. Besterman was propounding *questions* on behalf of the Subcommittee to "explore" the legal basis and economic impact of the commuter practice (Hearings at 166, 167). But we do not read his remarks as expressing a firm opinion. He was, moreover, a staff employee, not a member of Congress.

At the hearings, Mr. Winings made a thorough presentation explaining the background and legal justification of the commuter practice, and there was



little discussion by any member of the Subcommittee. No member of the Subcommittee expressed doubt concerning the Service's interpretation of the 1952 Act or suggested a need to change it.[34] The Subcommittee never issued a report on this phase of its inquiry and never proposed any legislative changes.

Respondents assert that the 1965 Act's revision of Section 1181(b), characterized in *Gooch* as "a minor and obscure change in the language" (433 F. 2d at 80), in fact resulted from the 1963 discussion and was intended to change the commuter practice (Pl. Pet. 16). No documentation is offered to support this hypothesis.

The 1965 legislation was initiated in a proposal by President Kennedy to Congress on July 23, 1963, designed primarily to abolish the national origin quota system. Various bills to effectuate President Kennedy's recommendations were introduced and many hearings were held. On January 13, 1965, President Johnson urged Congress to act on these proposals. H. Doc. No. 52, 89th Cong., 1st Sess. The bill was extensively amended and introduced as H.R. 2580, 89th Cong., 1st Sess.

A revised version of H.R. 2580 was favorably reported to the House on August 6, 1965. H. Rep. No. 745, 89th Cong., 1st Sess. The Committee report adverted to the many hearings held on this measure in 1964,[35] and to the primary objective of abolishing the

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[34] Representative Poff correctly characterized the commuter's status as "somewhat unique" (Hearings at 166).

[35] There is no mention of the unrelated hearings held in 1962 and 1963, including the one in which the discussion between Winings and Besterman took place.

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national origin quota system (*id.* at 1, 10). It listed 9 basic changes proposed by the Committee, none of which even implied an intention to change the commuter practice (*id.* at 18).

The Senate Committee Report also referred to numerous hearings conducted by the Committee in 1964 and to the primary purpose to repeal the national origin quota system. S. Rep. No. 748, 89th Cong., 1st Sess., p. 10. The report then stated (*ibid.;* emphasis added):

> In addition to numerous ***technical and minor changes,*** the bill would also make other basic changes in the Immigration and Nationality Act, as follows: * * *

The Report then listed 12 "basic changes," none of them relating to commuters.

Viewing the "eloquent silence * * * in the massive legislative history of the 1965 changes," the Ninth Circuit could find no basis for concluding "that Congress intended to close our borders to commuters when it enacted a technical revision of section 1181(b)." *Gooch* v. *Clark, supra,* 433 F. 2d at 80, 81. We agree. It is reasonable to conclude that if Congress had intended to make a major change in the long-established commuter system, some indication of that purpose would have emerged at some point in the comprehensive and carefully developed legislative history of the 1965 Act. The "eloquent silence" in that legislative history, broken only by the inconsequential exchange between Winings and Besterman, is a compelling indication that the commuter system was not meant to be affected.



*5. Post-1965 legislative activity.*

In recent years, there has been much discussion of the commuter practice, and a number of legislative proposals to terminate it have been introduced. In all of the legislative discussions, the Service has maintained its continued adherence to the established administrative treatment of commuters under the 1952 Act, and there is no indication that Congress views the Service's interpretation of the Act as incompatible with the legislative intent. Moreover, Congress has not yet acted on any of the legislative proposals to change the commuter practice.

Section 21 of the 1965 Act, 79 Stat. 920, provided for the establishment of a Select Commission on Western Hemisphere Immigration. The legislative members of the Select Commission included some of the most active and knowledgeable members of Congress in immigration matters: Senators Eastland, Kennedy, and Hart, and Representatives Celler, Feighan, and Rodino. The Service submitted a paper to the Select Commission fully discussing the background and legal basis for its commuter interpretation. Western Hemisphere Report, *supra,* pp. 99 *et seq.* The Commission made no recommendation with respect to alien commuters. Its report stated (*id.* at 14):

> The Commission's attention has also been directed to the matter of "commuters" and the problems presented by the employment in the United States of persons admitted as permanent resident aliens but opting to live in Mexico or Canada. Brief hearings have been held on this matter by several members of Congress

and legislation has been introduced to alter the status of these "commuters." The Commission proposed to study this matter by holding hearings within the next few weeks and may make recommendations on this subject in the form of an addendum to this report or via individual comment of Commission members, as may seem appropriate.

Months after submission of the Commission's report, two of its members, Chairman Richard M. Scammon and Stanley H. Ruttenberg, Assistant Secretary of Labor, addressed a letter to the President, dated July 22, 1968, making personal recommendations, on which they were not in agreement, for changes in the statute to modify the alien commuter practice. No legislation has yet resulted from these recommendations.

Previously, there had been hearings on alien commuters before the Subcommittee on Immigration and Naturalization of the Senate Judiciary Committee on September 22, 1967, at which Service representatives appeared and discussed their interpretation and application of the commuter system. These hearings were never published, and were not followed by any Committee report or legislative proposals sponsored by the Committee.

On February 19, 1969, the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, issued a report on the Migratory Farm Labor Problem proposing changes in the alien commuter system. The report stated that "[t]he problem of the commuting alien can be resolved not by drastically putting an end to the commuter system, but by refining its current operations." S. Rep. No. 91–83, 91st Cong., 1st Sess., pp. 61–65. Thereafter, the same Subcommittee held hearings on the Border Commuter Labor Problem on May 21, 1969. Those hearings, including comprehensive responses by the Service to detailed questions posed by the Committee, are included in Part 5–A of the published hearings. The Committee has issued no further report and has neither proposed nor acted on specific legislative amendments.



In 1970, Subcommittee No. 1 of the House Judiciary Committee conducted hearings on various proposed changes in the immigration laws. In the course of the hearings Representative Feighan, then Chairman of the Subcommittee, called attention to bills proposing changes in the commuter practice, and discussed the implications and desirability of such legislation with Charles Gordon, General Counsel of the Service, testifying before the Committee. Mr. Gordon urged the desirablity of legislative consideration of this problem, and suggested alternative approaches. Hearings on H.R. 9112, H.R. 15092, H.R. 17370, 91st Cong., 2d Sess., pp. 205–207. Mr. Gordon stated (*id.* at 207):

> Beyond that, under the present statute we feel that the course of 43 years of continuous interpretation, following what we believe is the policy which Congress wants us to follow, has to be continued. If Congress wants to make a different policy, we think it is appropriate and desirable, indeed, to have this spelled out in the statute.

The Committee did not express any disapproval of this statement, and has never issued any report or endorsed any bill making such legislative changes.

Finally, we point out that in recent years a number of bills seeking changes in the alien commuter system have been introduced in Congress.[36] Some of these would require aliens admitted as immigrants to become actual residents. Some would create a new nonimmigrant class for border-zone workers. Some would require commuters to comply periodically with labor certification requirements. Some would allow a phase-out period for the commuters.[37] But none has yet been favorably reported by any congressional committee, and no bill to change the alien commuter system has been approved by Congress.

6. The foregoing survey of legislative history bearing upon the commuter practice demonstrates a continuous awareness by Congress of the alien commuter program during its entire 47-year history and an absence of any authoritative indications of legislative disapproval. Indeed, there are positive expressions of congressional approval at critical junctures in the legislative development, and the total picture is one of acceptance and ratification. In the light of this overwhelming array of evidence, we submit that the ad-

[36] These bills include the following. *90th Congress:* S. 2790, H.R. 17493; *91st Congress:* S. 1694, H.R. 9505, S. 3545; *92d Congress:* S. 1373, H.R. 8746, S. 1488, H.R. 15309, H.R. 14831; *93d Congress:* S. 2643, H.R. 3870, H.R. 10141, H.R. 10466, H.R. 980.

[37] Several of the proposals are discussed in the Notes cited in note 24, *supra*, 21 Stanford L. Rev. at 1768–1776, and 48 N.Y.U. L. Rev. at 476–479.



ministrative interpretation has been and continues to be a reasonable and lawful interpretation of the will of Congress.

C. *Determining the Future of the Commuter Program Requires the Resolution of Competing International and Economic Interests; That Task is a Peculiarly Legislative One That Should, Particularly In View of the History of Congressional Acquiescence in and Approval of the Commuter System, Be Left to Congress*

It is fair to conclude from the long-standing administrative practice with respect to alien commuters, and the pattern of congressional acquiescence in and approval of the commuter system, that the Service's interpretation of the current statute is correct and that any change in the treatment of commuters must be initiated by Congress rather than the courts. That conclusion is bolstered, we submit, by the delicacy of the interests that must be reconciled in deciding upon the future of the program. The nature of the problem makes it peculiarly suited for legislative, rather than judicial, resolution.

1. In pressing their attack upon the commuter program, plaintiffs invoke the interests of American workers in adequate employment opportunities, wages, and working conditions. These are unquestionably legitimate concerns. But one must not overlook the other important interests that would be affected by an abrupt termination of the commuter system.[38]

[38] The competing considerations are explored in some depth in the Notes cited in note 24, *supra*, 21 Stanford L. Rev. at 1762–1768, and 48 N.Y.U. L. Rev. at 473–476.

First there is at stake the livelihood of thousands of alien commuters, most of whom have been commuting to stable employment in this country for many years. There are more than 42,000 daily commuters from Mexico, some 25,000 of whom are engaged in occupations other than agriculture. The total of Canadian commuters exceeds 12,000. Western Hemisphere Report, *supra,* at 104. The Service has estimated that there are an additional 8,300 seasonal commuters.[39] Termination of the program would profoundly affect the lives of these persons and of the many thousands of family members who are economically dependent upon them.[40] As the court of appeals stated with respect to daily commuters (Govt. Pet. App. 28):

> [W]e are aware that the perpetuation of the daily commuter system is vital to the lives of thousands of daily commuters on both sides of our land borders. These individuals make important contributions to the economies of their respective cities, such as Windsor-Detroit, and reversal of the present practice would cause severe dislocation and hardships. * * *

[39] This figure includes only those commuters who reside in this country for six months or less each year. Any immigrant who resides here for longer than six months per year is considered by the Service to be an actual resident, not a commuter (see Govt. Pet. App. 23–24, n. 14). The court of appeals, however, held that this practice by the Service "is without statutory or logical basis" (*ibid.*). We disagree with that holding, because we believe the Service may properly infer from an immigrant's residence in this country for more than half the year that his "principal, actual dwelling place in fact" (8 U.S.C. 1101(a)(33)) is in the United States. But if the court of appeals is correct that "seasonal commuter" includes any immigrant who has a home in Mexico to which he returns at some time during the year, then the number of seasonal commuters affected by the decision below would be substantially larger than 8,300.

[40] The State Department has estimated that there are 250,000 family members dependent on the income earned by commuters. Statement of Assistant Secretary of State Oliver to the Senate Subcommittee on Immigration, September 25, 1967, p. 6.



Sudden termination of the program might also have a disruptive effect on the economy of border communities on both sides of the border. It has been estimated by the U.S. Commission on Civil Rights, for example, that Mexican commuters would stand to lose $50 million of annual income;[41] the State Department has estimated that commuters account for 25 to 30 percent of the income earned by the labor force in some Mexican border communities.[42] Termination of the commuter program might intensify the existing unemployment problems in the Mexican border area (see Note, *supra,* 48 N.Y.U. L. Rev. at 474).

Moreover, since commuters have been lawfully admitted for permanent residence, they would be free to establish permanent residences in this country if their commuting rights were curtailed. The impact on American border communities of a substantial number of new residents, requiring housing and education, would obviously be significant (see *id.* at 475–476).

Still another interest that must be taken into account is that of the agricultural and other employers in the border area who depend upon the labor of alien

[41] See U.S. Commission on Civil Rights, *Stranger in One's Land*, p. 12 (1970).

[42] See Statement of Assistant Secretary of State Oliver, *supra* note 40, at 4.

commuters. An abrupt end to the commuter program could decimate their work force.

2. Apart from the difficult questions of domestic economic and labor policy that would be implicated in any decision on the future of the commuter system, substantial and delicate issues of foreign policy would be raised as well. The affidavit of former Secretary of State William P. Rogers (Govt. Pet. App. 38–40), submitted in the district court, states that "[a] sudden judicial termination of the commuter system, displacing the present immigrant commuters, would have a serious deleterious effect upon our relations with both Mexico and Canada" (*id.* at 38).[43] The Department of State had expressed similar apprehensions in letters of Secretary of State Cordell Hull in 1937 and 1939 (see p. 50, *supra*), and in affidavits of Secretary of State Dean Rusk, submitted in *Texas State AFL-CIO* v. *Kennedy*, 330 F. 2d 217 (C.A. D.C.), certiorari denied, 379 U.S. 826, and in *Gooch* v. *Clark*, *supra*.

Secretary Rogers' affidavit in this case explains in some detail the reason for those apprehensions. The "flow of persons and goods across the United States-Mexican border has helped the development of strong

[43] Although the affidavit draws no distinction between daily and seasonal commuters, the court of appeals construed it as directed only at daily commuters (Govt. Pet. App. 21, n. 9). The Department of State has advised us that no such distinction was intended and that the concerns expressed in the affidavit apply to seasonal as well as daily commuters. If the matter were deemed pertinent on remand, the Department of State would consider submitting a further affidavit from Secretary of State Kissinger confirming this advice.



and mutually beneficial economic relations" (Govt. Pet. App. 38). A "disruption in the life" of the border cities—some of which "have grown into single economic communities"—"would do real harm to good neighbor relations in the area" (*id.* at 39). Purchases by Mexican nationals of American goods on this side of the border "constitute a major portion of retail sales" (*ibid.*); if significant numbers of Mexican nationals were deprived of their earning power because of a reduction in commuter traffic, "trade between the two countries along the border would be substantially reduced," and there would likely be "an immediate depressing effect on the economy of the region on both sides of the border" (*ibid.*).

Similarly, "Canadian commuters * * * are a significant element in the economies of the United States and Canada" (*id.* at 40). A "sudden disruption of this traditional practice would be inconsistent with the trend toward closer economic cooperation with Canada" and "could also adversely affect our relations with Canada and the status of United States nationals and investment in Canada" (*ibid.*). According to the affidavit, the "Government of Canada, like the Government of Mexico, has expressed its concern over litigation attacking the status of immigrant alien commuters" (*ibid.*).

For these reasons, Secretary Rogers concluded (*ibid.*):

> [I]t is my opinion that the judicial termination of the commuter system would be damaging to the foreign relations of the United States.

> Any adjustment that may be desirable should be fashioned by administrative or legislative processes which are better suited to distinguish situations and to accommodate conflicting interests.

3. We thus agree with the court of appeals' conclusion (though we would extend it to both classes of commuters) that, in view of the administrative and legislative history of the commuter program, any change in the system should be left to Congress. The court stated (Govt. Pet. App. 27):

> Where an administrative practice has continued in existence for over 45 years and has consistently been extended in the light of various immigration Acts which have never expressed any mention or disavowal of the practice, efforts to change or eliminate such a practice should be addressed to the Congress, not to the Courts.

As Secretary of State Rogers indicated, Congress has the institutional capacity to weigh all the complex considerations of foreign and domestic policy, to accommodate the important conflicting interests, and to solve the problems with the characteristic flexibility of the legislative process. In the absence of clear evidence that Congress has already performed that task and has determined to end the long-standing commuter program, we submit that any modification in that program should be left to the crucible of the legislative process.



## III

### THE SEASONAL COMMUTER PROGRAM STANDS ON THE SAME FOOTING AS THE DAILY COMMUTER PROGRAM

The court of appeals held that the seasonal commuter program, unlike the daily commuter program, is inconsistent with the statute. That conclusion rests, we submit, upon a fundamental misconception concerning the relationship of the "bracero" program to the commuter program.

1. The bracero program began in the period of manpower shortages following World War II. It was established by an agreement between the United States and Mexico, known as the Migrant Labor Agreement of 1951, which provided for the recruitment of Mexican nationals for agricultural work in the United States under established safeguards. The agreement was implemented in 1951 by temporary legislation that was thereafter extended from time to time."

The legislation authorized the Secretary of Labor to recruit agricultural workers from the Republic of Mexico, to transport them to the United States, and to assist them in negotiating employment contracts (7 U.S.C. 1461). Recruited workers were "admitted to the United States subject to the immigration laws * * *

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" The 1951 legislation amended the Agricultural Act of 1949, 63 Stat. 1051, by adding a new Title V entitled "Agricultural Workers" (65 Stat. 119). The subsequent amendments and extensions are found at 67 Stat. 500, 68 Stat. 28, 69 Stat. 615, 72 Stat. 934, 74 Stat. 1021, 75 Stat. 761, and 77 Stat. 363. The current text of Title V still appears as 7 U.S.C. 1461–1468, even though the program has been terminated

for such time and under such conditions as may be specified by the Attorney General" (7 U.S.C. 1464). During the life of the program, hundreds of thousands of braceros were admitted each year for temporary employment in the United States (see 1964 Annual Report of the Immigration and Naturalization Service, p. 60). Constantly rising opposition to the bracero program, however, culminated in Congress's refusal to extend it beyond December 31, 1964, and the program terminated on that date. See 1 Gordon and Rosenfield, *Immigration Law and Procedure*, § 6.9.

The court of appeals stated that "the Service after the termination of the bracero program in 1964 created a new class of commuter—a 'new immigrant,' the seasonal worker" (Govt. Pet. App. 20). In its view, "[t]he metamorphosis of the bracero to seasonal commuter is directly inconsistent with Congress's purpose in ending the bracero program in order to eliminate its adverse impact on American workers" (*ibid.*). The seasonal commuter program, according to the court, "is a short-lived invention of the Service * * * which flies in the face of traditional Congressional concern for the American working man" (*id.* at 21), "a jerry-built patchwork, a synthetic construct hastily assembled after the termination of the bracero program" (*id.* at 30). These observations are the foundation for the court's holding that seasonal commuters, unlike daily commuters, may not properly be admitted to this country as lawfully admitted immigrants returning from a temporary visit abroad.



The court's characterization of the seasonal commuter program appears to rest on two assumptions: (1) that the program began after the bracero program was terminated, and (2) that "seasonal commuter" is simply a new name given the former bracero. These assumptions are not supported by the stipulation of the parties or by anything else in the record. They are, in fact, incorrect.

In finding that the Service "in 1964 created a new class of commuter" (Govt. Pet. App. 20), the court relied on a 1967 statement by a former official of the Service that seasonal commuters came into being "*largely* after the repeal of the bracero law" and that "*many of them* are former braceros" (see *ibid.*; emphasis added). But that statement does not suggest that there were no seasonal commuters previously. On the contrary, it is wholly consistent with the fact that the seasonal commuter concept had developed long before the bracero program was terminated.[45]

There was in fact an increase in the number of seasonal commuters in the years *before* termination of the program.[46] This resulted in part from efforts by em-

[45] Nor do we comprehend the logic of the court's apparent reliance upon a statement of counsel at oral argument that the seasonal commuter was "inconspicuous" prior to the 1952 Act (Govt. Pet. App. 20, n. 7). That the government "admitted" (*ibid.*) this fact hardly supports a finding that the program originated in 1964.

[46] The Annual Reports of the Service show that total immigration from Mexico was increasing before 1964 but that it dramatically decreased in fiscal 1964 and only slightly increased in fiscal 1965 (when the bracero program was terminated). Chart 8 in each of the Annual Reports shows the following fig-

ployers to encourage their bracero workers to apply for and obtain the status of immigrants lawfully admitted for permanent residence. This is confirmed by a letter from the Mexican Ambassador to the United States to the Secretary of State, dated June 21, 1963, set forth in H. Rep. No. 722, 88th Cong., 1st Sess., p. 7. The letter states:

> In the last 3 years there has been a considerable increase in the number of Mexican farmworkers who have applied for and obtained residence visas to come to the United States, through letters issued by farmers and growers in the United States who have offered them employment. It is estimated that no less than 32,000 farmworkers obtained their documents in 1961 and possibly some 40,000 in 1962.

To similar effect is the following excerpt from the Western Hemisphere Report, *supra*, p. 104:

> The number of commuters increased rapidly along the Mexican border during the years of the bracero program. U.S. employers assisted the best of the braceros in obtaining immigrant visas and status as permanent residents. These workers retained their domicile in Mexico and became commuters, forming a pool of legal agricultural workers near the border. It was this pool of available legal labor which played a major role in the termination of the bracero program.

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ures for the number of Mexican immigrants admitted annually: 1959—23,061; 1960—32,684; 1961—41,632; 1962—55,291; 1963—55,253; 1964—32,967; 1965—37,969. These figures do not support the court of appeals' suggestion that the many thousands of braceros were redesignated immigrant commuters when the program ended in December 1964.



While many braceros may have become seasonal commuters, the program was not a "synthetic construct" (Govt. Pet. App. 30) designed to circumvent the termination of the bracero program. Unlike most of the Mexican nationals who were specially admitted as braceros, an alien admitted under the seasonal commuter program first had to attain the status of an immigrant lawfully admitted for permanent residence. That status could be gained only upon compliance with every substantive, procedural, and documentary requirement prescribed by law for the admission of immigrants. If a seasonal commuter's initial entry as an immigrant occurred after the effective date of the 1965 amendments to the Act, he would have had to satisfy in addition the new labor certification requirements discussed above (pp. 36–39, *supra*). But once he had achieved lawful admission for permanent residence, he was no longer dependent upon the bracero program for his seasonal readmissions. Like the daily commuter, he was treated under the Act as returning from a temporary visit abroad.

There is thus no basis for the court's assumption that "seasonal commuter" is simply a new name for "bracero." Not all braceros became seasonal commuters because not all sought and obtained lawful admission as immigrants. Those who did had a new status that they lacked as braceros, and that new status entitled them to seasonal readmission so long as the status remained unchanged. There was no administrative legerdemain and no evasion of congressional will. Some braceros simply took advantage of a procedure

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that was available well before that program ended. That the seasonal commuter program grew as the bracero program reached an end suggests only that more of the farmworkers sought immigrant status, not that the Service redesignated the braceros as seasonal commuters and continued to admit them on the same basis as before.

2. The court's misapprehension concerning the history and structure of the seasonal commuter program, and particularly its relationship to the bracero program, also accounts for its failure to recognize that congressional approval of the Service's commuter practice extends to both the daily and seasonal programs. The premise of the court's analysis—that the seasonal program is so "recent in origin" and "synthetic," "hastily assembled after the termination of the bracero program," "that it cannot be given serious consideration as a meaningful guideline for the interpretation of the statute" (Govt. Pet. App. 30)—we have shown to be without support.

The fact is that there has never been any significant distinction between the daily and seasonal commuters. The Service has always taken the position that a lawfully admitted immigrant returning from a visit to his home in Mexico or Canada is in the identical legal posture whether his stays in this country are for one day, two days, a month, or a whole season. What has mattered is that he has previously been admitted as an immigrant with the privilege of establishing a permanent residence, and that his status has not changed. Congressional approval of this practice has



in no instance been limited to commuters who cross the border daily. And, while seasonal commuters may not have been a large group until the early 1960's, the administrative practice predates the end of the bracero program and, like the daily commuter practice, is entitled to great weight in interpreting the present statutory language.

3. The court of appeals also rested its separate treatment of seasonal commuters on its reading of Secretary of State Rogers' affidavit (Govt. Pet. App. 38–40) as applying only to daily commuters (*id.* at 21, n. 9, and 29, n. 26). We have already shown (p. 66, n. 43, *supra*), that this interpretation of the affidavit is incorrect and that the concerns expressed in the affidavit relate to termination of the seasonal commuter program as well as the daily program.

4. Finally, the court held (1) that seasonal commuters must be treated as nonimmigrants under 8 U.S.C. 1101(a)(15)(H)(ii) because, unlike daily commuters, the services they perform in this country are temporary (Govt. Pet. App. 22–23 and n. 13), and (2) that they cannot be treated as "returning resident immigrants" free to enter with informal documentation under 8 U.S.C. 1181(b) because, unlike daily commuters, their place of employment cannot be equated with the concept of "residence" (*id.* at 28).

We think the court's distinctions are illusory. The services performed by seasonal commuters are of no less permanent nature than those performed by daily commuters (see p. 21, n. 11, *supra*), and the seasonal commuter, who actually lives in this country during

protracted periods, can be said no less than daily commuters to be residing at his place of employment (see p. 32, n. 19, *supra*).

But we have, in any event, already demonstrated that, regardless of whether their services in this country are temporary or permanent, neither daily nor seasonal commuters can be viewed as nonimmigrants. Even if they were to follow the prescribed procedure for seeking that status (see pp. 22–23, *supra*), they would be disqualified from classification as nonimmigrants so long as unemployed laborers could be found in the United States to perform the services performed by commuters (see pp. 19–21, *supra*). Likewise, we have shown that actual residence in this country is not required in order to acquire and retain the status of an immigrant lawfully admitted for permanent residence (pp. 24–28, *supra*). It is therefore immaterial whether daily or seasonal commuters may be said to reside at their place of employment.

5. We therefore conclude that seasonal commuters cannot be treated differently from daily commuters under the Act. If members of the former class cannot be readmitted to this country as special immigrants, we see no basis in law or logic for permitting daily commuters to be readmitted on that basis either. The two programs must stand or fall together.

The administrative practice of permitting seasonal commuters to acquire and retain the status of aliens lawfully admitted for permanent residence is consonant with the traditional and congressionally approved administrative interpretation in regard to daily commuters. It rests on the same statutory provisions, legislative intent, and policy considerations, and is a reasonable and proper implementation of the legislative will.



## CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it upholds the validity of the daily commuter program, and should be reversed insofar as it invalidates the seasonal commuter program. The case should be remanded with directions to reinstate the judgment of the district court.

Respectfully submitted.

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MARCH 1974.

# APPENDIX

## *A. Statutes and Regulation Involved*

**1. Section 101(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1101(a), provides in part:**

> **(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—**
>
> *** * * * ***
>
> **(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;**
>
> *** * * * ***
>
> **(H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as a trainee; * * *.**
>
> *** * * * ***
>
> **(20) The term "lawfully admitted for permanent residence" means the status of having been**

lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

* * * * *

(27) The term "special immigrant" means—

* * * * *

(B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad; * * *.

2. Section 211 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1181, provides:

(a) Except as provided in subsection (b) no immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa or was born subsequent to the issuance of such visa of the accompanying parent, and (2) presents a valid unexpired passport or other suitable travel document or document of identity and nationality, if such document is required under the regulations issued by the Attorney General. * * *

(b) Notwithstanding the provisions of section 212(a)(20) of this Act in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, returning resident immigrants, defined in section 101(a)(27)(B), who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit, or other documentation.

3. Section 212(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a), provides in part:

Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to



receive visas and shall be excluded from admission into the United States:

* * * * *

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 101(a)(27)(A) (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in section 203(a)(3) and (6), and to nonpreference immigrant aliens described in section 203(a)(8);

* * * * *

(20) Except as otherwise specifically provided in this Act, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 211(a); * *.

4. 8 C.F.R. 211.1 provides in part:

> (b) *Aliens returning to an unrelinquished lawful permanent residence—(1) Form I–151 Alien Registration Receipt Card.* In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year may present Form I–151, Alien Registration Receipt Card, duly issued to him * * *.
>
> When the Secretary of Labor determines and announces that a labor dispute involving a work stoppage or layoff of employees is in progress at a named place of employment, Form I–151 shall be invalid when presented in lieu of an immigrant visa or reentry permit by an alien who has departed for and seeks reentry from any foreign place and who, prior to his departure or during his temporary absence abroad has in any manner entered into an arrangement to return to the United States for the primary purpose, or seeks reentry with the intention, of accepting employment at the place where the Secretary of Labor has determined that a labor dispute exists, or of continuing employment which commenced at such place subsequent to the date of the Secretary of Labor's determination.
>
> (2) *Reentry permit.* In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad may present a valid, unexpired reentry permit duly issued to him. * * *
>
> (3) *Waiver of visas.* An immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad who satisfies the district director in charge of the port of entry that there is good cause for his failure to present an immigrant visa, Form I–151, or reentry permit



> may, upon application on Form I–193, be granted a waiver of that requirement. * * *

*B. Excerpts From General Order No. 86*

U.S. Department of Labor, Bureau of Immigration, Washington

APRIL 1, 1927.

No. 55479/537; 55266 General.

GENERAL ORDER NO. 86

Subject: Land border crossing procedure

1. Hereafter aliens residing in foreign contiguous countries and entering the United States to engage in existing employment or to seek employment in this country will not be considered as visiting the United States temporarily as tourists, or temporarily for business or pleasure, under any provisions of the Immigration Law which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the "immigrant" class.

2. However, the following aliens of the said "immigrant" class residing in foreign contiguous countries and who are now enjoying the border crossing privilege may continue so to enjoy it upon the payment of head tax, provided such head tax was assessible on aliens entering permanently at the time of original admission and, provided further, that they are not coming to seek employment.

A. Aliens whose original admission occurred prior to June 3, 1921.

B. Natives of nonquota countries whose original admission occurred prior to July 1, 1924.

* * * * *

3. Aliens of all nationalities of the "immigrant" class whose original admission occurred subsequent to June 30, 1924, will be required to meet all provisions of the Immigration Laws applying to aliens of the "immigrant" class. Aliens of this class already enjoying

the border crossing privilege, however, will be granted a reasonable time, not to exceed six months from July 1, 1927, within which to obtain immigration visas and otherwise comply with the laws.

4. Aliens who have already complied with the requirements of the Immigration Laws and this General Order may be permitted to continue to enjoy the border crossing privilege.

5. Aliens who have complied with the requirements of this General Order governing permanent admission will be considered as having entered for permanent residence.

6. The use and issuance of identification cards to all classes of aliens entitled to same will continue as heretofore.

7. Identification cards held by or issued to aliens of the "immigrant" class shall be rubber-stamped as follows:

IMMIGRANT

* * * * *

10. All identification cards heretofore issued, held by aliens who cannot, or do not, meet the requirements of law, regulations and this order, will be taken up and canceled upon an incoming trip of the holder and appropriate action taken.

* * * * *

12. The status of holders of identification cards shall be inquired into periodically * * *. When the holder of a "non-immigrant" identification card qualifies as an "immigrant," a new identification card shall be issued, stamped to show the correct status.

GEORGE J. HARRIS,
*Acting Commissioner General.*

Approved:
ROBE CARL WHITE,
*Assistant Secretary.*

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